



4191-02UP

## SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA-2018-0026]

RIN 0960-AI27

Rules Regarding the Frequency and Notice of Continuing Disability Reviews

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise our regulations regarding when and how often we conduct continuing disability reviews (CDR), which are periodic reviews of eligibility required for benefit continuation. The proposed rules would add a category to the existing medical diary categories that we use to schedule CDRs and revise the criteria for assigning each of the medical diary categories to cases. The proposed rules would also change the frequency with which we perform a CDR for claims with the medical diary category for permanent impairments. The revised changes would ensure that we continue to maintain appropriate stewardship of the disability program and identify medical improvement (MI) at its earliest point.

DATES: To ensure your comments are considered we must receive your comments by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method.

Regardless of which method you choose, please state that your comments refer to Docket No. SSA-2018-0026 so that we may associate your comments with the correct regulation.

CAUTION: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the Search function to find docket number SSA-2018-0026 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (410) 966-2830.

3. *Mail:* Address your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov> or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Cheryl A. Williams, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-1020. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet

site, Social Security Online, at <http://www.socialsecurity.gov>.

## SUPPLEMENTARY INFORMATION:

### *I. Background*

Section 221(i) of the Social Security Act (Act) provides that, when we determine a person is disabled, we periodically review the case to ensure that the individual continues to meet the disability eligibility requirements of the Act. We must complete these periodic reviews at least once every 3 years, except when we determine the requirement should be waived, or when we determine that the disability is permanent, in which case, we can perform the review when we deem appropriate. We call the periodic reviews required under the Act “continuing disability reviews” (CDR).

Section 221(i)(2) of the Act also requires that we report this activity to Congress annually. In the most recent report we submitted to Congress, we reported that:

. . . we spent \$717 million to complete 1,971,812 periodic CDRs. Of this total, we completed 1,172,799 mailer CDRs. We also completed 799,013 full medical reviews. . . . Our Office of the Chief Actuary (OCACT) . . . estimates that the periodic CDRs completed in FY 2015 will result in a present value of \$14.3 billion in lifetime net Federal program benefits saved. For FY 2015, the estimated ratio of net program savings to administrative costs is approximately \$19.9 to \$1.<sup>1</sup>

#### *A. Why we conduct CDRs – A Brief History*

We conduct CDRs to determine whether a person who receives Social Security disability benefits<sup>2</sup> under title II of the Act or Supplemental Security Income (SSI)

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<sup>1</sup> Social Security Administration, Annual Report on Medical Continuing Disability Reviews, Fiscal Year 2015 (2019). Available at: <https://www.ssa.gov/legislation/FY%202015%20CDR%20Report.pdf>.

<sup>2</sup> We pay three benefits based on disability under title II: disability insurance benefits (DIB), disabled widow(er) benefits, and childhood disability benefits.

payments under title XVI of the Act continues to meet the disability or blindness requirements of the law.<sup>3</sup>

Prior to the Social Security Disability Amendments of 1980 (1980 Amendments),<sup>4</sup> we did not conduct CDRs on all of our beneficiaries to ensure that they continued to meet the Act's definition of disability. Instead, our procedures at the time provided that we conducted CDRs only on a limited set of beneficiaries who had conditions that we expected to improve.<sup>5</sup> In the 1970s, the disability incidence rate (the number of disability awards in relation to the population) increased significantly, with substantial increases in the cost of the disability program. During this period, the Social Security Amendments of 1972 (1972 Amendments) extended Medicare coverage to disability beneficiaries, with the opportunity for improved disability outcomes.<sup>6</sup> Congress held numerous hearings and considered a package of legislative actions to strengthen the integrity of the disability program and improve program administration. The 1980 Amendments added section 221(i) to the Act, which required us to conduct CDRs at least once every 3 years for all title II disability beneficiaries with nonpermanent impairments, and at our discretion for all title II disability beneficiaries with permanent impairments.<sup>7</sup> Section 221(i) of the Act established the periodic review or CDR requirement as one of the most valuable program integrity tools that allows us to maintain good stewardship of taxpayer dollars by ensuring only those who continue to meet our standards for disability continue to receive benefits.

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<sup>3</sup> Sec. 221(i)(2) of the Act; 42 U.S.C. 421(i)(2); 20 CFR 404.1590(a), 416.990(a).

<sup>4</sup> Pub. L. 96-265, section 311, 94 Stat. 441, 460.

<sup>5</sup> H.R. Rep. No. 96-944, at 60 (1980) (Conf. Rep.) Available at <https://www.ssa.gov/history/pdf/Downey%20PDFs/Social%20Security%20Disability%20Amendments%20of%201980%20Vol%202.pdf>.

<sup>6</sup> Pub. L. 92-603, sec. 201, 86 Stat. 1329, 1371.

<sup>7</sup> *Id.*

In 1983, Congress amended section 221(i) of the Act to allow us to determine how many CDRs we conduct annually in each State based on the backlog of pending reviews, the projected number of new disability applications, and State staffing levels.<sup>8</sup>

In October 1984, Congress passed the Social Security Disability Benefits Reform Act of 1984, which mandated that we publish regulations establishing standards to be used in determining the frequency of CDRs.<sup>9</sup> Congress did so for several reasons. First, Congress expressed concern that people who are found eligible for benefits after a lengthy administrative appeal not find themselves subjected to a second eligibility review after only a relatively brief period. On the other hand, Congress was also concerned that we not neglect our responsibility to review the cases of even those beneficiaries who have impairments that we categorized as permanent.<sup>10</sup>

In May 1986, we published final rules that revised four sections and added one new section to our regulations that set forth the standards for conducting CDRs in title II disability and title XVI SSI cases.<sup>11</sup> In the 1986 final rules, we explained that, although section 221(i) of the Act applied only to title II disability cases, we would apply the new rules applied to title XVI SSI cases to provide consistency in the operation of the disability programs. We did this based on our broad regulatory authority under title XVI

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<sup>8</sup> Pub. L. 97-455, sec. 3, 96 Stat. 2497, 2499; sec. 221(i)(2) of the Act.

<sup>9</sup> Pub. L. 98-460, sec. 15, 98 Stat. 1794, 1808.

<sup>10</sup> “Conversely, with the number of people now classified administratively as being permanently impaired approaching 40 percent of the disabled-worker benefit rolls, the Committee is concerned that the responsibility to assess the continuing eligibility of such beneficiaries not be neglected. A failure to periodically review eligibility in these cases could seriously undermine the intent of the 1980 legislation.” S. Rep. No. 98-466, at 28 (1984). Available at <https://www.ssa.gov/history/pdf/Downey%20PDFs/Downey%20Book%201984%20PL%2098-460.pdf>.

<sup>11</sup> 51 FR 16818, May 7, 1986; 20 CFR 404.1589, 404.1590, 416.989, 416.989a, 416.990.

of the Act, sections 1631(d)(1) and 1633, and the legislative history of the 1980 Amendments.<sup>12</sup>

When we implemented the current rules in 1986, we established a process of administrative controls to keep track of the review cycle for each case, including the impairment(s) and its type (permanent or nonpermanent) and the review category assigned. We refer to this process of controls as “CDR diaries.”

Since we published the 1986 final rules, we have revised our rules to reflect statutory changes. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>13</sup> requires us to conduct CDRs at age 1 for children with low birth weight when low birth weight is a contributing factor material to our determination that they were disabled.<sup>14</sup> The Balanced Budget Act of 1997<sup>15</sup> modified the requirement for a CDR at age 1 to allow the Commissioner to schedule the CDR at a later date if the child’s impairment is not expected to improve by age 1 and to revise our definition of a permanent impairment for title XVI child recipients.<sup>16</sup> We incorporated these provisions into our rules on February 11, 1997, and September 11, 2000, respectively.<sup>17</sup>

The Ticket to Work and Work Incentives Improvement Act of 1999<sup>18</sup> included two provisions that affect the scheduling of CDRs. Under the first provision, we will not initiate a CDR while the person is using a Ticket to Work.<sup>19</sup> Under the second provision,

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<sup>12</sup> 51 FR at 16819. In the final rules, we note that “[t]he report of the Senate Committee on Finance states: “The committee believes that such [periodic review] procedures should be applied on the same basis to the DI and SSI programs.”

<sup>13</sup> Pub. L. 104-193, sec. 212(c), 110 Stat. 2105, 2193.

<sup>14</sup> 62 FR at 6430, 65 FR at 54790.

<sup>15</sup> Pub. L. 105-33, sec. 5522(a), 111 Stat. 251, 622.

<sup>16</sup> 62 FR at 6430, February 11, 1997.

<sup>17</sup> 62 FR 6430, Feb. 11, 1997; 65 FR 54790, Sept. 11, 2000.

<sup>18</sup> Pub. L. 106-170, sec. 111(a), 113 Stat. 1860, 1881.

<sup>19</sup> 42 U.S.C. 1320b-19(i), 20 CFR 411.165.

we will not initiate a CDR based solely on work activity for beneficiaries who have been entitled to benefits under title II for at least 24 months. We will initiate regularly scheduled CDRs that are not triggered by work.<sup>20</sup>

#### *B. When and how we conduct CDRs*

We conduct periodic program integrity reviews to ensure title II beneficiaries and title XVI SSI disability recipients continue to meet each program's respective eligibility criteria. After we initially find that a claimant is disabled, we schedule the periodic review required by the Act to determine if the person is still medically eligible for payments based on disability. As we explained earlier, this evaluation is known as a CDR. The frequency of a medical CDR depends on the beneficiary's prospective MI. MI is categorized into one of three "medical diary categories."<sup>21</sup>

1. *Medical Improvement Expected (MIE)*. The medical diary category that requires us to conduct a CDR most frequently is the MIE medical diary category. We generally conduct a CDR on a case with a MIE diary in not less than 6 months, but not more than 18 months.<sup>22</sup> We use the MIE diary category for cases in which we expect the person's disabling impairment(s) to improve, so that the person will be able to engage in substantial gainful activity (SGA). We also use the MIE diary category for title XVI SSI childhood disability cases in which we expect the child's impairment(s) to improve, so the impairment(s) no longer results in marked and severe functional limitations.<sup>23</sup>

Examples of impairments that receive a MIE diary include fractures, cancers with bone

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<sup>20</sup> 71 FR 66856, Nov. 17, 2006.

<sup>21</sup> 20 CFR 404.1590(b)(1)-(2), 416.990(b)(1)-(2).

<sup>22</sup> 20 CFR 404.1590(c), (d); 416.990(c), (d).

<sup>23</sup> See section 1614(a)(4)(B)(i) of the Act.

marrow or stem cell transplantation, chronic kidney disease with a kidney transplant, and low birth weight. We set an MIE diary for most infants who are allowed based on their low birth weight because we are required by the Act to review such cases when they reach age 1 unless the facts of the case indicate that medical improvement before age 1 is not expected.<sup>24</sup> We set the diary for all other cases receiving a MIE diary based on the facts of the case, with most diaries set at 12 months.

2. *Medical Improvement Possible (MIP)*. The MIP medical diary category requires us to conduct a CDR regularly, but less frequently than for claims in the MIE diary category. For cases in the MIP diary category, we conduct a CDR at least once every 3 years.<sup>25</sup> We use the MIP diary category for those cases in which any medical improvement is possible, that is, nonpermanent impairments. We use this diary category for impairments in both adults and children for which we cannot predict improvement of the impairment(s) based on current experience and the facts of the case.<sup>26</sup> Examples of impairments that frequently receive a MIP diary include Crohn's Disease (regional enteritis), sickle cell disease, chronic ulcerative colitis, epilepsy, and schizophrenia.

3. *Medical Improvement Not Expected (MINE)*. The MINE medical diary category requires us to conduct a CDR less frequently than the preceding two diary categories.<sup>27</sup> Under this category, we conduct a CDR for a title II disability or a title XVI case at least once every 7 years, but no more frequently than once every 5 years.<sup>28</sup> We use the MINE diary category for cases with disabling impairments that, based on medical

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<sup>24</sup> See section 1613(a)(3)(H)(iv) of the Act.

<sup>25</sup> 20 CFR 404.1590(d), 416.990(d).

<sup>26</sup> 20 CFR 404.1590(c), 416.990(c).

<sup>27</sup> *Id.*

<sup>28</sup> 20 CFR 404.1590(d), 416.990(d).



knowledge and practices, and our administrative experience, we determine to be “at least static, but more likely to be progressively disabling either by itself or by reason of impairment complications, and unlikely to improve so as to permit the person to engage in substantial gainful activity.”<sup>29</sup> We use this category for title XVI disabled children who have an impairment(s) that is unlikely to improve to the point that they no longer have marked and severe functional limitations.<sup>30</sup> Based on our analysis of case outcomes for CDRs on older beneficiaries, we also use this category for cases in which the person would be age 54½ or older when a CDR diary would be due. We provide examples of impairments that we consider permanent in the current rule, including amyotrophic lateral sclerosis (ALS), Parkinsonian Syndrome (Parkinson’s disease), diffuse pulmonary fibrosis in a person age 55 or over, and amputation of the leg at the hip. We provide additional guidance about permanent impairments in our current operating instructions.<sup>31</sup>

We establish the medical diary category when we first determine that a person is disabled under our rules. We notify the beneficiary about the timing of the initial CDR in the award notice we send. We also notify the beneficiary about the timing of the next CDR in the notice that we send about the CDR determination. When we conduct a CDR, we may change the medical diary category for future reviews based on the evidence we receive during the CDR.

We may also revise the frequency of review for certain impairments because of improved tests, treatment, or other medical advances concerning the impairments.<sup>32</sup>

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<sup>29</sup> 20 CFR 404.1590(c), 416.990(c).

<sup>30</sup> 20 CFR 416.990(c).

<sup>31</sup> Program Operations Manual System (POMS) DI 26525.045 at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525045>.

<sup>32</sup> 20 CFR 404.1590(e), 416.990(e).

When we change the diary category for specific impairments, we incorporate the changes into our employee operating instructions, which are publically accessible.

For people who are found eligible to receive or continue to receive disability benefits based on a decision by an administrative law judge, the Appeals Council, or a Federal court, we do not conduct a CDR earlier than 3 years after that decision unless the case meets the criteria for a MIE diary.<sup>33</sup> In any case, however, we may conduct a CDR earlier than the diary date if a question of continuing disability is raised.<sup>34</sup>

When a medical review diary matures, we conduct periodic CDRs using one of two methods. We decide whether to initiate a full medical review (FMR) or send a mailer after profiling all cases to identify the likelihood of MI. We send cases with a higher likelihood of MI to the State Disability Determination Services (DDS) for FMRs. For those cases with a lower likelihood of MI, we send mailers to obtain more information from the beneficiaries, which we evaluate to determine if there is any indication of MI. If we find an indication of MI, we send the case to a DDS for a FMR. Otherwise, we set a new medical review diary and schedule the case for a future CDR. If a mailer results in a deferral, we reset the diary date based on the original category. If a FMR results in a continuance, we will determine whether there is a change in classification of the impairment as permanent or nonpermanent and set a new diary accordingly. We use the mailer process for approximately 65 percent of the periodic CDRs we conduct each year.

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<sup>33</sup> 20 CFR 404.1590(f), 416.990(f). We may also establish a diary before 3 years if the person should be scheduled for a vocational reexamination diary or if a question of continuing disability arises under 20 CFR 404.1590(b) or 416.990(b).

<sup>34</sup> Additional guidance for initiating a CDR is in 20 CFR 404.1590(b)(3) - (10) and 416.990(b)(3) - (10). In most instances, we will identify the CDR issue at the field office level. If there is any question about the appropriateness of initiating a CDR, the field office will request assistance from SSA's regional or central office staff or the state disability determination services before taking any action.

## *II. The changes we are proposing*

We want to ensure that we continue to identify MI at its earliest point through the CDR process. We also want to have the flexibility to adjust the scheduling of CDRs when there have been advances in treatment for a person's impairment(s) that improve the ability to work or, for children receiving title XVI payments, that improve overall health and functioning. Therefore, we are proposing to make three changes to our current rules on when and how often we conduct CDRs. First, we propose to add a fourth medical diary category. Next, we propose to revise the criteria we follow to assign a medical diary to each case. Finally, we propose to retain the frequency for the MIE and MIP diary categories (6 to 18 months and 3 years, respectively) and revise the frequency with which we perform a CDR for the MINE diary category.

The flexibility these proposed changes would allow us to determine MI at an earlier point than we can under our current rules. Consequently, we expect that the changes we are proposing would enhance program integrity and ensure that only those who continue to qualify for benefits will receive them.

### *A. Expanding the medical diary categories from three to four*

When we evaluate a person's continuing disability during a scheduled review, we consider whether there has been MI in the condition that resulted in the finding of disability. We use the medical diary categories to capture MI at the earliest point.

We propose adding a new medical diary category, the Medical Improvement Likely (MIL) diary category. When we assign a case to the MIL diary category, we would review it approximately every two years, which is less frequently than cases in the

MIE diary category, but more frequently than cases in the MIP and MINE diary categories. We schedule cases for a FMR or a mail questionnaire based on our predictive model that identifies the cases most likely to exhibit MI (i.e., where MI is most likely to have occurred).

This proposed expansion of the diary categories reflects changes brought by our experience over time administering CDRs in the existing three categories. When we analyzed CDR case outcomes for MIE diaries, we noticed that there were some types of cases where the MIE category resulted in a continuance for the first CDR but resulted in a cessation<sup>35</sup> for the subsequent CDR.<sup>36</sup> This was often an indication that the first CDR was conducted too early to identify MI. We also realized that our employee operating instructions already recognize that the 6 to 18 month period for MIE diaries is not adequate for some impairments we expect to improve.<sup>37</sup> In particular, we set longer MIE diaries (2 years) for several impairments, such as leukemia, lymphoma, and malignant solid tumors in children. Based on the number of cases that seemed to fall between the MIE and MIP diary periods, we analyzed CDR outcomes for certain conditions, their assigned diary categories, and their associated MI rates. We identified several conditions that could have diaries in either the MIE or MIP categories. The MI rates were similar between both diary categories, suggesting that the MIP diary may not have captured MI at the optimum time.<sup>38</sup> As a result, we are proposing to add a fourth category between MIE and MIP that would allow us to align our CDRs more directly to when certain

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<sup>35</sup> A cessation is a determination or decision that the disabled individual no longer meets the definition of disability and is not eligible to continue to receive benefits or payments *see* 20 CFR 404.1597 and 416.995.

<sup>36</sup> *See* the Supporting Document “Cessation Rates by Impairment” under Docket No. SSA-2018-0026 at: [www.regulations.gov](http://www.regulations.gov).

<sup>37</sup> POMS DI 26525.030 at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525030>.

<sup>38</sup> *See* the Supporting Document “Cessation Rates by Diary Category” under Docket No. SSA-2018-0026 at: [www.regulations.gov](http://www.regulations.gov).

conditions are more likely to medically improve. Additionally, adjusting the frequency of review for several diary categories reflects our experience for what timeframes are more likely to result in identifying MI at the earliest point, as we discuss in section C.

For many disabling impairments, the key element for MI is a person's receipt of treatment that can decrease the severity of the impairment and its effects. When people do not receive adequate treatment, any MI in the disabling impairment(s) may not occur when we would otherwise expect it for impairments likely to improve. This is especially important in light of the data documenting the percentage of individuals with unmet health care needs. In 2015, 31.4 percent of people with two or more chronic conditions delayed, or did not obtain, needed medical care due to a cost or other non-cost reason (even if they had health insurance).<sup>39</sup> Scheduling a CDR under the MIE category (6 to 18 months) may be premature when MI does not occur as expected due to unmet health care needs. The MIL diary category will allow us to assess MI after some beneficiaries benefit from access to health care through Medicare or Medicaid to determine if they continue to be eligible for benefits.

When we identify and evaluate MI at its earliest point, beneficiaries know the CDR outcome and can make plans for their return to the labor force within a shorter period of time. We believe that there may be positive employment effects as a result of these proposed rules, although we cannot currently quantify them. For example, using our administrative data<sup>40</sup> on entitlement periods and earnings for a group of beneficiaries and

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<sup>39</sup> Ward, B.W., "Barriers to health care for adults with multiple chronic conditions: United States, 2012 - 2015." NCHS data brief, no. 275. Hyattsville, MD: National Center for Health Statistics, 2017.

<sup>40</sup> Supplemental Security Record – March and June 1996 DA&A Extracts; Supplemental Security Record – Longitudinal File; Master Beneficiary Record – 810 File; Disability Master File/831 File; Numident File; Master Earnings File. *See* Moore, T. J., "The employment effects of terminating disability benefits," Journal of Public Economics, vol. 124(C), 2015, Appendix A.

recipients whose benefits terminated due to a 1997 statutory change, a researcher at the National Bureau of Economic Research looked at the effect of the loss of benefit eligibility on work activity during the year of benefit termination and the next 11 years (1997 through 2008).<sup>41</sup> Overall, about 22 percent returned to work at an SGA level during the first three years following benefit termination.

In many cases, shortening the time a person spends out of the labor force may improve work outcomes. Our analysis of our administrative data confirms that the majority of all working-age people in the general population<sup>42</sup> who spend one year or more out of the work force<sup>43</sup> do not return to work at an SGA level.<sup>44</sup> However for those people who do return to the work force, employment rates are higher the shorter the time a person is out of the work force. For example, in 2013, 35.5 percent of the 40-year-old adults who had been out of the work force for 1 year returned to work at an SGA level. The percentage of the 40-year-olds who returned to work at an SGA level dropped to 27.1 percent after 2 years out of the work force, 17 percent after 3 years, and to only 7.4 percent after 7 years. In the same year, 30.7 percent of the 50-year-old adults out of the work force for 1 year returned to work at an SGA level, 23.5 percent after 2 years, 14 percent after 3 years, and only 5.5 percent after 7 years out of the work force.<sup>45</sup> Although the data shows a modest correlation between the length of time outside of the workforce and likelihood of reentering at an SGA level, the data does not provide evidence of causality between the two.

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<sup>41</sup> *Id.*, pp. 30-43.

<sup>42</sup> This group includes people who are not SSA beneficiaries, as well as people who are SSA beneficiaries.

<sup>43</sup> “Time out of the labor market” means years without earnings above \$1,000.

<sup>44</sup> See SSA Office of Research, Evaluation, and Statistics (ORES) analysis of data from the Continuous Work History Sample, Likelihood of Returning to Employment by Age and Time Out of the Labor Market. Available at [regulations.gov](https://www.regulations.gov) as supporting and related material for docket SSA-2018-0026.

<sup>45</sup> *Id.*

The employment response to Social Security Disability Income (SSDI) and SSI income loss is supported by recent research by our Office of Research, Demonstration, and Employment Support (ORDES), that looked at earnings for the 5-year period after SSDI and SSI beneficiaries had their benefits ceased following a FMR.<sup>46</sup> The ORDES researchers found that “[t]he majority of ceased beneficiaries have some earnings in the 5 years after a FMR cessation.”<sup>47</sup> In this research, the researchers also found that the percentage of former beneficiaries with earnings from work 5 years after a FMR cessation declines with age from “[n]early 90 % of ceased beneficiaries aged 18 to 30” to “below 60 % for beneficiaries aged 50 to 59.”<sup>48</sup> They also analyzed employment outcomes based on the type of diaries established on the cases and found that beneficiaries who had a MIE diary set (with a higher probability of MI) had higher rates of employment and earnings following benefit termination than those who had a MIP or MINE diary.

Further, there is evidence that parents of SSI children who medically improve offset the loss of SSI benefits through earned income. Research on the effect of SSI payments on household income and earnings found that “. . . a [household] loss of \$1,000 in the child’s SSI payment [due to the loss of payments after a CDR<sup>49</sup>] increases parental earnings—by \$700 to \$1,400.”<sup>50</sup> Furthermore, there was “. . . some evidence that the volatility [variability] of parental earnings decreases in response to the child’s removal

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<sup>46</sup> Hemmeter, J. and Bailey, M. S., “Earnings after DI: evidence from full medical continuing disability reviews,” *IZA Journal of Labor Policy*, vol. 5 (1), 1 - 22. doi:<http://dx.doi.org/10.1186/s40173-016-0066-9>.

<sup>47</sup> *Id.*, p. 15.

<sup>48</sup> *Id.*, p. 12.

<sup>49</sup> The loss of benefits was due to MI in the child’s conditions identified through the CDR process.

<sup>50</sup> Deshpande, M., “The effect of disability payments on household earnings and income: Evidence from the SSI children’s program,” *The Review of Economics and Statistics*, 98(4), (2016), p. 639. Available at: [https://www.mitpressjournals.org/doi/pdf/10.1162/REST\\_a\\_00609](https://www.mitpressjournals.org/doi/pdf/10.1162/REST_a_00609).

from SSI.”<sup>51</sup> The evidence did not demonstrate a similar rise in income from other unearned income sources, including other disability income sources. The evidence also showed that the loss of the child’s SSI payments decreased the number of SSDI and SSI applications from other members of the household. These responses to the loss of SSI payments suggest that there may be a shift in the reliance on SSDI and SSI as a permanent, reliable income source for the household.

*B. Revising the criteria we follow to assign each case to each diary category*

We propose revising the criteria we use to assign a diary for a case. We provided broad descriptions of the types of cases in each diary category when we established the three diary categories in 1986.<sup>52</sup> We have provided detailed guidance on specific impairments to be assigned to each category in our employee operating instructions.<sup>53</sup> Although we intend to continue that practice, we will also revise our guidance on the types of impairments considered in the three existing diary categories to accommodate the addition of the MIL diary category. In making these revisions, we will consider advances in medical technology and treatment that has improved outcomes for many impairments. For example, improvements in medication regimens for individuals with human immunodeficiency virus (HIV) infection have resulted in a change from a disease that was invariably fatal to a chronic condition that “allows high levels of functioning and prolonged survival.”<sup>54</sup> When we revised our rules for evaluating HIV in 2016,<sup>55</sup> we

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<sup>51</sup> *Id.*

<sup>52</sup> 51 FR 16818 (May 7, 1986).

<sup>53</sup> POMS DI 26525.000 at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525000>.

<sup>54</sup> Institute of Medicine (2010). *HIV and Disability: Updating the Social Security Listings*. Washington, DC: The National Academies Press. Retrieved from: <https://www.nap.edu/read/12941/chapter/1#ix>.

<sup>55</sup> 81 FR 86915, December 2, 2016.



revised our operating instructions for setting CDR diaries. We now establish the CDR diary based on the facts of the case and no longer set a MINE diary automatically. We have only made one other change in diary category for a specific impairment: changing lung transplants from MIE to MIP - lengthening the review period based on outcomes and mortality data. Prior to these two recent changes, the last set of changes we made were in the mid- to late-1990s based on administrative data.

We also propose to modify the criteria for the existing diary categories (MIE, MIP, and MINE) and establishing criteria for the new category as described below. We initially selected the medical conditions based on when our predictive model suggests improvement and medical evidence. We solicit public comment on information that would help inform impairment classification to most effectively align medical criteria with the correct diary category.

1. *MIE diary*: We currently set an MIE diary for a case if we expect the disabling impairment to improve. Several factors can prompt an MIE diary, such as current significant, sustained, and progressive improvement; recent or planned interventions or treatment that should result in significant and sustained MI; onset of the disabling impairment within the last 12 months with no irreversible organ or structural damage and favorable response to current treatment; or recent or planned surgery that is expected to resolve the impairment.<sup>56</sup> We also establish a MIE diary for favorable determinations and decisions based on medical listings that include a specified period of disability as set out in the regulations (e.g., 3.03, *Asthma*, 6.04, *Chronic kidney disease*, with kidney

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<sup>56</sup> POMS DI 26525.025 at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525025>.

transplant, 103.03, *Asthma*, and 106.04, *Chronic kidney disease*, with kidney transplant) and for most cases allowed based on an infant's low birth weight.

We propose to continue to use the MIE diary category for allowances we make based on medical listings that include a specified period of disability as indicated above and for allowances based on an infant's low birth weight. With the exception of claims we allow based on low birth weight, the criteria for establishing MIE diaries will be the same for adults and children.

We will publish and include in our publicly accessible employee operating instructions those impairments for which an MIE diary is appropriate because we expect them to improve.<sup>57</sup> We will still evaluate whether disability continues for a person with an impairment or combination of impairments in the MIE category using our existing rules.

We may revise the frequency of review for certain impairments because of improved tests, treatment, or other medical advances concerning the impairments.<sup>58</sup> We may also revise the frequency of review for certain impairments based on our predictive modeling. When we change the diary category for specific impairments, we will update the list of impairments in the MIE, MIL, and MINE diary categories that we maintain in our employee operating instructions, which are publicly accessible.<sup>59</sup>

When combined with the frequency changes described in section C, we anticipate completing about 1.2 million FMRs (out of approximately 7.3 million total), as well as 56,000 mailer deferral reviews (out of approximately 12 million total) from fiscal years

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<sup>57</sup> POMS at: <https://secure.ssa.gov/poms.nsf/Home?readform>.

<sup>58</sup> 20 CFR 404.1590(e), 416.990(e).

<sup>59</sup> POMS DI 26525.000 at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525000>.

(FY) 2020-2029 in the MIE category. Additionally, of the 1.2 million FMRs, 746,000 would affect title II beneficiaries, and 459,000 would affect title XVI recipients (including 240,000 child CDRs,<sup>60</sup> 15,000 age 18 redeterminations,<sup>61</sup> and 204,000 adult medical reviews over 10 years). Similarly, of the 56,000 mailer deferral reviews, review for 35,000 title II beneficiaries and 22,000 recipients would result in deferrals.<sup>62</sup>

We based the workload estimates on the impairments we expect to include in the MIE diary category as explained in this NPRM. We identified the impairments to be included in the MIE diary category on our recent data and experience with CDR outcomes.<sup>63</sup> Once we implement the final rules, we may change the impairments included in the MIE category based on the comments we receive on this NPRM, advances in medical knowledge, our predictive modeling, and our data on CDR outcomes.

2. *MIL diary*: This is a new diary category. We propose to use the MIL diary category, instead of the MIE or MIP diary categories, to conduct reviews for specific impairments that typically do not result in permanent, irreversible structural damage and are amenable to improving with treatment. This category will apply to impairments in both adults and children, and will include some claims that currently fall into the MIE and MIP diary categories. Some examples of claims that we expect to include in this category are favorable determinations and decisions for both adults and children based on cancer listings that include a specified minimum period of disability (for example,

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<sup>60</sup> This figure includes 115,000 CDRs for low birth weight infants.

<sup>61</sup> Age 18 redeterminations are considered a part of the CDR workload for planning and budget purposes. However, the assigned diary category does not affect the selection for review. Furthermore, all age 18 redeterminations receive a FMR.

<sup>62</sup> The total mailer deferral reviews does not equal the sum of components due to rounding.

<sup>63</sup> The impairments tentatively identified for inclusion in the MIE diary category are included in the Supporting Document “Underlying Assumptions on Impairments in CDR Diary Categories,” under Docket No. SSA-2018-0026 at: [www.regulations.gov](http://www.regulations.gov). These characteristics were used in the underlying assumptions to estimate changes in the programmatic and administrative cost for this proposed rule.

leukemia, lymphoma), anxiety disorders, speech impairments, and malignant solid tumors in children. This category will also include cases in which we make a favorable determination or decision based on the inability to adjust to other work (i.e., allowances at step 5 of the sequential evaluation process<sup>64</sup>). We would include step 5 allowances in the MIL diary category unless we would establish a MINE diary based on the impairment and specific case characteristics identified in section B.4 below.

We will also include some childhood disability claims in this category for children who are approaching a chronological age with key developmental activities, for example, age 6 with a transition into formal education, and at age 12 with a transition into adolescence.

We will publish and include in our publicly accessible employee operating instructions those impairments that for which an MIL diary is appropriate because they are amenable to treatment and likely to improve.<sup>65</sup> As in any other case, we will evaluate whether disability continues for a person with an impairment or combination of impairments in the MIL category using our existing rules.

When combined with the frequency changes described in section C, we anticipate completing about 1.8 million FMRs (out of approximately 7.3 million total), as well as 2.6 million mailer deferral reviews (out of approximately 12 million total) from FYs 2020-2029 in the MIL category. Additionally, of the 1.8 million FMRs, 579,000 would affect title II beneficiaries, and 1.2 million would affect title XVI beneficiaries (including 627,000 child CDRs, 152,000 age 18 redeterminations, and 406,000 adult CDRs over 10

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<sup>64</sup> See 20 CFR 404.1520(a)(4)(v) and 416.920(a)(4)(v).

<sup>65</sup> POMS at: <https://secure.ssa.gov/poms.nsf/Home?readform>.

years). Similarly, of the 2.6 million mailer deferral reviews, reviews of 1.8 million title II beneficiaries and 814,000 title XVI recipients would result in deferrals.

Our Office of the Chief Actuary based the workload estimates on the impairments we expect to include in the MIL category as explained in this NPRM. We identified the impairments to be included in the MIL diary category on our recent data and experience with CDR outcomes. Once we implement the final rules, we may change the impairments included in the MIL category based on the comments we receive on this NPRM, medical advances, predicative modeling, and our data on CDR outcomes.<sup>66</sup>

3. *MIP diary*: We currently establish a MIP diary when the case does not meet the criteria for establishing a MIE, MINE, or vocational reexamination diary.<sup>67</sup> We also establish MIP diaries for most favorable determinations based on cancer, except when we based the favorable determination on a cancer listing that includes a specified minimum period of disability. For example, under listing criterion 13.06, *Leukemia*, we consider the person “under a disability until at least 24 months from the date of diagnosis or relapse.”

Although we propose using specific claim characteristics to determine cases in the MIE, MIL, and MINE diary categories, most cases would receive a MIP diary because the impairment(s) does not meet the criteria for establishing a MIE, MIL, or MINE diary. In effect, it would be the diary of “last resort” for impairments that do not fit into the other three diary categories. We would retain our current policy using the MIP diary

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<sup>66</sup> The impairments or other case characteristics, tentatively identified for inclusion in the MIL diary category are included in the Supporting Document “Underlying Assumptions on Impairments in CDR Diary Categories,” under Docket No. SSA-2018-0026 at: [www.regulations.gov](http://www.regulations.gov). These characteristics were used in the underlying assumptions to estimate changes in the programmatic and administrative cost for this proposed rule.

<sup>67</sup> A vocational reexamination diary is set to review a case at a later date because the person is undergoing vocational therapy, training, or an educational program that is expected to improve the ability to work to the extent that the person is no longer disabled.

category for cases that are allowed based on meeting or equaling a cancer listing if section 13.00H2 applies, that is, “we will consider an impairment(s) . . . disabling until at least 3 years after onset of complete remission.”<sup>68</sup>

When combined with the frequency changes described in section C, we anticipate completing about 3.7 million FMR (out of approximately 7.3 million total), as well as 6.5 million mailer deferral reviews (out of approximately 12 million total) from FYs 2020-2029 in the MIP category. Additionally, of the 3.7 million FMRs, 1.3 million would affect title II beneficiaries, and 2.4 million would affect title XVI beneficiaries (including 1.1 million child CDRs, 427,000 age 18 redeterminations, and 908,000 adult CDRs over 10 years). Similarly, of the 6.5 million mailer deferral reviews, reviews of 4.7 million title II beneficiaries and 1.9 million title XVI recipients would result in deferrals.<sup>69</sup>

These estimates are based on the assumptions that, if the case does not meet any of the MIE or MIL criteria, then current rules for MIP diary category continue to apply and the diary will be determined according to current rules.

4. *MINE diary*: We currently set a MINE diary when the person has a chronic or progressive impairment or a combination of impairments, with permanent, irreversible structural damage or functional loss for which there is no known effective therapy, treatment, or surgical intervention. Generally, impairments with permanent, irreversible structural damage or functional loss will meet or medically equal a listing in the Listing of Impairments.<sup>70</sup> Both children and adults may have an impairment in the MINE diary category. Examples of impairments in the MINE diary category that occur in both

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<sup>68</sup> 20 CFR part 404, subpart P, appendix 1.

<sup>69</sup> The total mailer deferral reviews does not equal the sum of components due to rounding.

<sup>70</sup> *Id.*

children and adults include muscular dystrophy, Down syndrome, cerebral palsy, and chronic kidney disease with dialysis. Examples of impairments in the MINE diary category that generally occur only in adults include amyotrophic lateral sclerosis, multiple sclerosis, and Huntington's disease. We may also set a MINE diary currently for a case where the person has an impairment, or combination of impairments, that is static or progressive, and, when considered with vocational factors, may be considered permanent.

We propose to retain the category criteria for cases with a chronic or progressive impairment, or combination of impairments, with permanent, irreversible structural damage or functional loss and for which there is no known effective therapy, treatment, or surgical intervention. Most of the impairments we consider permanent will meet or equal a listing in the Listing of Impairments.<sup>71</sup> For impairments that do not meet or equal a listing, we propose to retain consideration of the interaction of a person's age, functional limitations resulting from the impairment(s), and the time since the person last engaged in SGA when we decide if the person's impairment(s) is permanent and, thus, subject to a MINE diary. For example, we would consider a person's schizophrenia to be a permanent impairment and subject to a MINE diary if the person was age 46 1/2 at the time of review and the onset was at least five years before the determination.<sup>72</sup>

We currently identify 10 impairments that would receive a MINE diary based on the interaction of age and functional limitations and an additional seven based on the interaction of age, functional limitations, and time out of the workforce. Step 5 allowances based on these 17 impairments would continue to receive a MINE diary. The

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<sup>71</sup> *Id.*

<sup>72</sup> POMS DI 26525.045B at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525045>.

table below describes our proposed sub-regulatory guidance for the 17 impairments that will be assigned a MINE diary based on vocational factors in combination with specific impairments. These impairments are subject to change with advancements in medical treatments and findings from our predictive model.

<i>Age and Functional Limitations</i>	<i>Age, Functional Limitations, and Time Out of the Workforce</i>
Amyotrophic lateral sclerosis	Depressive, bipolar and related disorders
Angina	Huntington's disease
Late effects of injuries to the nervous system	Intellectual disorder
Multiple sclerosis	Late effects of cerebrovascular disease
Other diseases of the spinal cord	Neurocognitive disorders
Parkinsonian syndrome	Other cerebral degenerations
Peripheral arterial disease	Schizophrenia spectrum and other psychotic disorders
Phlebitis	
Rheumatoid arthritis	
Spondylitis	

When combined with the frequency changes described in section C, we anticipate completing about 559,000 FMRs (out of approximately 7.3 million total), as well as 2.8 million mailer deferral reviews (out of approximately 12 million total) from FYs 2020-2029 in the MINE category. Additionally, of the 559,000 FMRs, 223,000 would affect title II beneficiaries, and 336,000 would affect title XVI recipients (including 33,000 child CDRs, 188,000 age 18 redeterminations, and 115,000 adult CDRs over 10 years). Similarly, of the 2.8 million mailer deferral reviews, reviews of 2.0 million title II beneficiaries and 826,000 title XVI recipients would result in deferrals.



These estimates are based on the assumptions that, if the case does not meet any of the proposed criteria for the MIE and MIL diary categories, then current rules for the MINE diary category continue to apply and the diary will be determined according to current rules.

*C. The frequency of a CDR for each of the four medical diary categories.*

Finally, we propose to retain two and revise one of our existing medical diary categories rules on how often we perform a CDR. The following table summarizes the differences between the current and proposed policies:

<i>Diary Category</i>	<i>Current Policy</i>	<i>Proposed Policy</i>
MIE	6 - 18 months	6 - 18 months (unchanged)
MIL	NA	2 years
MIP	3 years	3 years (unchanged)
MINE	5 to 7 years	6 years

As stated earlier, unless a question of continuing disability is raised in a particular case, we currently schedule CDRs to be performed every 6-18 months for cases in the MIE diary category, at least once every 3 years for cases in the MIP diary category, and no less frequently than once every 7 years but no more frequently than once every 5 years for cases in the MINE diary category.<sup>73</sup> We propose to retain the current timeframes for cases in the MIE diary category (6-18 months) and the MIP diary category (at least once every 3 years) because we structured the new diary category to identify the cases likely to

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<sup>73</sup> 20 CFR 404.1590(c), (d), 416.990(c), (d).

improve between 18 months and 3 years. The timeframe for cases in the proposed MIL diary category will be at least once every 2 years.

We propose to revise the timeframe for cases in the MINE diary category from no less frequently than once every 7 years but no more frequently than once every 5 years, to at least once every 6 years. When we published the current rules in 1986, we stated that “[a]ll individuals with permanent impairments will be assigned a 7-year review cycle.”<sup>74</sup> We also noted that the rules established flexibility in the frequency of review “to permit assigning different review periods to different permanent impairment categories should future experience indicate it to be more appropriate to review certain impairments on different time cycles than others.”<sup>75</sup>

Since we began using the current rules in 1986, we have not used a shorter review period for permanent impairments. When we have identified the need to change the diary categories for specific impairments, it has involved a change in classification from permanent to nonpermanent impairments. For example, we changed the overall classification of HIV from a permanent to nonpermanent impairment. We have not identified any permanent impairments for which a 5-year review period is medically appropriate. Based on this experience, we believe that maintaining the variable period of review for permanent impairments is not necessary. Therefore, we propose to set the review period for permanent impairments, that is, the MINE diary, at 6 years in order to identify such improvement at its earliest point while providing enhanced consistency and clarity surrounding the review cycle’s timeline.

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<sup>74</sup> 51 FR 16821 (May 7, 1985).

<sup>75</sup> Id.

We propose to revise the timeframes for the frequency of the medical diary categories as described above for the same reasons we propose to expand the medical diary categories, to ensure that we continue to identify MI at its earliest point so that beneficiaries who have medically improved and are no longer disabled return to the workforce at the earliest point possible.

As a result of the addition of the MIL category and the change in frequency for certain categories, we expect the following workload shifts in the anticipated number of full medical CDRs completed over the 10-year period from FYs 2020-2029:

<i>Diary Category</i>	<i>CDRs under Current Category<sup>1</sup></i>	<i>CDRs under Proposed Category<sup>1</sup></i>	<i>Net Change<sup>1</sup></i>	<i>Percent Change vs. Current Category Total</i>
MIE	986	1,205	219	22.2%
MIL	--	1,764	1,764	--
MIP	4,605	3,738	-867	-18.8%
MINE	559	559	--	--
Total	6,150	7,267	1,116	18.1%

<sup>1</sup> Calculated in thousands.

Although we are proposing to revise the criteria for assigning diary categories to cases and to revise the frequency of CDRs for some cases, we are not changing the manner in which we conduct CDRs. We will continue to decide whether to initiate a FMR or send a mailer after profiling all cases to identify the likelihood of MI, as described in section I.B. above.

#### *D. Additional technical changes*

We propose to remove §§404.1577 *Disability defined for widows, widowers, and surviving divorced spouses for monthly benefits payable for months prior to January 1991*, 404.1578 *How we determine disability for widows, widowers, and surviving*

*divorced spouses for monthly benefits payable for months prior to January 1991*, and 404.1579 *How we will determine whether your disability continues or ends*. The rules in these sections apply to determining disability or continuing disability for widows, widowers, or surviving divorced spouses monthly benefits<sup>76</sup> payable for months prior to January 1991. All widows, widowers, and surviving divorced spouses who were affected by this regulation have reached full retirement age and are receiving monthly benefits based on age, not disability. Therefore, the regulations are obsolete and no longer needed.

We also propose to revise §404.1511 *Definition of disabling impairment*, which refers to the standard for widows, widowers, and surviving divorced spouses for monthly benefits for months prior to January 1991. In alignment with the removal of §404.1579, we propose to revise §404.1501 *Scope of subpart*, §404.1505 *Basic definition of disability*, §404.1529 *How we evaluate symptoms, including pain*, and §404.1593 *Medical evidence in continuing disability review cases*, which refer to §404.1579. Finally, we propose to revise §404.335 *How do I become entitled to widow's or widower's benefits?*, §404.336 *How do I become entitled to widow's or widower's benefits as a surviving divorced spouse?*, and §404.1576 *Impairment-related work expenses*, which refer to §404.1577 or §404.1578.

We propose to revise current §§404.1590(f) - (g) and 416.990(f) - (g) (proposed §§404.1590(e) - (f) and 416.990(e) - (f)) to improve readability. We also propose to remove the reference to the Social Security Disability Benefits Reform Act of 1984 (Pub. L. 98-460) in current §§404.1590(g) and 416.990(g) because the reviews required by this law were a one-time workload and have been completed.

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<sup>76</sup> See 20 CFR 404.335(c).

We propose to make conforming changes in proposed §§404.1590(h) and 416.990(h) to reflect the redesignation of current §§404.1590(b)(4) - (b)(8), 404.1590(i), 416.990(b)(4) - (b)(8), and 416.990(i).

*E. What rules are not changing*

We are not changing the Medical Improvement Review Standard that we use to determine whether a person continues to meet the disability requirements of the Act.<sup>77</sup>

The rule that we will not initiate a medical CDR during any period in which a person is using a ticket under the Ticket to Work program remains in place with no change.<sup>78</sup> The primary purpose of this provision is to ensure that Ticket to Work program participants are not inhibited in their attempts to work or pursue an employment plan by the fear that such activities will increase the likelihood that their benefits will be terminated in a medical review. This provision allows people to seek the services they need to work without increasing the likelihood that their benefits will be terminated by a CDR. This protection from a CDR will remain available for people who are using a ticket to work, and the incentive to participate enhanced.

We are also not changing the rule that exempts work activity as the sole basis for initiating a medical CDR for people who work and receive benefits based on disability under title II of the Act.<sup>79</sup> This protection will continue for people who work and have received disability benefits under title II. As noted in section I.A. above, we will initiate regularly scheduled medical CDRs that are not triggered by work.

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<sup>77</sup> 42 U.S.C. 423(f); 20 CFR 404.1594, 416.994, 416.994a.

<sup>78</sup> 42 U.S.C. 1320b-19; 20 CFR 404.1590(h), 411.165 – 411.226, 416.990(h).

<sup>79</sup> 42 U.S.C. 421(m); 20 CFR 404.1590(i), 416.990(i).

### III. *Other considerations*

#### A. *How long these proposed rules would remain in effect*

If we publish these proposed rules as final rules, they would remain in effect until we revise or rescind them.

#### B. *Clarity of these proposed rules*

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. Therefore, in addition to substantive comments on these proposed rules, we invite comments on how to make them easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rules clearly stated?
- Is there clarity surrounding how diary assignments would change?
- Do we have the correct classifications for impairments that would shift into the MIL or other diary categories?
- Have we organized the material to suit the needs of the reader?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?
- Do the rules contain technical language or jargon that is not clear?
- Would a different format make the rules easier to understand, e.g., grouping and order of sections, use of headings, paragraphing?

*When will we start to use these rules?*

We will not use these rules until we evaluate public comments and publish final rules in the Federal Register. All final rules we issue include an effective date. We will continue to use our current rules until that date. If we publish final rules, we will include a summary of those relevant comments we received along with responses and an explanation of how we will apply the new rules.

#### IV. Regulatory Procedures

*Executive Order 12866, as Supplemented by Executive Order 13563*

We consulted with the Office of Management and Budget (OMB) on the significance of these proposed rules. Because the projected 10-year administrative costs of these proposed rules are \$1.8 billion, we determined that this NPRM meets the criteria for a significant economic regulatory action under Executive Order 12866, section 3(f)(1), as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

*Executive Order 13132 (Federalism)*

We analyzed this NPRM in accordance with the principles and criteria established by Executive Order 13132, and determined that the proposed rules will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. We also determined that this NPRM will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

### *Regulatory Flexibility Act*

We certify that this NPRM will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

### *Executive Order 13771*

Based upon the criteria established in Executive Order 13771, we have identified the anticipated program costs and administrative costs as the following. These estimates are based on the sub-regulatory assumptions detailed in the diary category descriptions in the preceding pages and the supplemental document titled: “Underlying Assumptions on Impairments in CDR Diary Categories.”

### *Anticipated Costs to Our Programs*

We estimate, based on the best available data, that this proposed rule, assuming that rediarying under the proposal would be implemented for all medical determinations or decisions made on or after June 1, 2020, would result in a net increase of roughly 2.6 million additional CDRs over the period from FY 2020 - 2029—1.1 million (an 18.4 percent increase) additional FMRs and 1.5 million additional CDR mailer reviews. The additional FMRs are estimated to result in a net reduction in Old-Age, Survivors, and Disability Insurance benefit payments of \$2.0 billion and a net decrease in federal SSI payments of \$0.6 billion over that same period.

### *Anticipated Costs to the Public*



As discussed previously, we anticipate conducting an additional 1.1 million additional full medical reviews from FYs 2020-2029 and an additional 1.5 million CDR mailer reviews when we implement these proposed rules following publication of final rules. We estimate that these additional CDRs will result in increased public “opportunity costs” of \$16,352,000 over a 10-year period. This figure represents an estimated hourly average Disability Insurance (DI) payment (in lieu of an hourly wage, since respondents to this collection are not generally employed) of \$10.22 multiplied by the additional annual burden hours resulting from the increased use of the two CDR Information Collection Requests (ICR) (OMB No. 0960-0072, full medical review and OMB No. 0960-0511, CDR Mailer) x 10 (representing a 10-year period). To clarify, this figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete a CDR ICR; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete OMB No. 0960-0072 or OMB No. 0960-0511 as a result of this policy.

In some, though not all, cases, we may need to ask respondents’ medical offices to provide us with updated medical records to supplement the CDR documentation submitted by the respondents. The time these offices’ administrative staff spend to gather and submit files to us represents another potential source of opportunity costs. However, since we do not have data on the percentage of cases in which we need to request additional information, it is not currently possible for us to estimate lost opportunity costs in this area. However, if the public wishes to submit comments on this issue, we will take them under consideration for future opportunity cost calculations.

The “Paperwork Reduction Act” section below in the preamble provides full burden calculations, including the time burden computations that informed the theoretical cost figure above. As discussed in that section, we are soliciting any additional feedback on assumptions made regarding the time burden of this collection and the theoretical opportunity cost to beneficiaries.

#### *Anticipated Administrative Costs to SSA*

Our Office of Budget, Finance, and Management estimates increased administrative program integrity costs, in addition to current costs, of approximately \$1.8 billion for the 10-year period from FYs 2020-2029. The costs are driven largely by a projected net increase of roughly 2.6 million CDRs over the 10-year timeframe. This NPRM assumes the fully-loaded costs of performing the full medical CDRs, work CDRs, and mailers, consistent with methodology used in the budget.

#### *Paperwork Reduction Act*

We use two existing OMB-approved ICRs as part of the medical review process: OMB No. 0960-0072 (“Continuing Disability Review Report,” which is the full CDR form) and OMB No. 0960-0511 (“Disability Report Update,” which is the abbreviated mailer CDR). We will not be changing these ICRs in any way to support these proposed rules. However, because the core policy of these proposed rules will cause a change in the frequency of use of these forms, increasing their public reporting burden for the first 10 years after implementation of the final rules, we are seeking OMB re-approval under the Paperwork Reduction Act for these ICRs. While the public is able to comment on any

aspects of these ICRs, since we are only changing their frequency of use, not their content, comments speaking to the former issue would be most useful.

Below are charts showing current burden estimates (time and associated opportunity costs) for both ICRs, as well as the total expected increase (the difference between the current and new estimates) resulting from implementation of the final rules. These estimates also helped to drive the opportunity cost figures cited in the “Anticipated Costs to the Public” section above.

***Table 1. Current and Projected New Annual Burden Figures for CDR ICR OMB No. 0960-0072 (“Full” CDR; form SSA-454).***

	<b>Number of Respondents</b>	<b>Response Time (minutes)</b>	<b>Burden Hours (Respondents x Response Time/60)</b>	<b>Opportunity Costs/Hour</b>	<b>Total Opportunity Costs (Burden hours x opportunity cost per hour)</b>
<b>Current Burden</b>	703,000	60 minutes	703,000 hours	\$10.22*	\$7,184,660
<b>Projected New Annual Burden Upon Publication of a Final Rule for this Proposal</b>	813,000	60 minutes	813,000 hours	\$10.22*	\$8,308,860
<b>Burden Change Resulting from Regulation</b>	110,000	-	+110,00 burden hours	-	+\$1,124,200 opportunity costs

***Table 2. Current and Projected New Annual Burden Figures for CDR ICR OMB No. 0960-0511 (“Mailer” CDR; form SSA-455).***

	<b>Number of Respondents</b>	<b>Response Time (minutes)</b>	<b>Burden Hours (Respondents</b>	<b>Opportunity Costs/Hour</b>	<b>Total Opportunity Costs (Burden hours x</b>
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			<b>x Response Time/60)</b>		<b>opportunity cost per hour)</b>
<b>Current Burden</b>	1,100,000	15 minutes	275,000 hours	\$10.22*	\$2,810,500
<b>Projected New Annual Burden Upon Publication of a Final Rule for this Proposal</b>	1,300,000	15 minutes	325,000 hours	\$10.22*	\$3,321,500
<b>Burden Change Resulting from Regulation</b>	200,000	-	50,000 burden hours	-	+\$511,000

\*Calculated based on average DI payments.

**Total Costs Associated With Implementation of these Proposed Rules Upon  
Publication in Final:**

- Time Burden: 160,000 burden hours (110,000 burden hour increase for OMB No. 0960-0072 plus 50,000 burden hour increase for OMB No. 0960-0511);
- Opportunity Cost Burden: \$1,635,200 (\$1,124,200 burden-associated opportunity cost increase for OMB No. 0960-0072 plus \$511,000 for burden-associated opportunity cost increase for OMB No. 0960-0511).

We are submitting an ICR for clearance to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated techniques or other forms of information technology. If you would like to submit comments, please send them to the following locations:

Office of Management and Budget

Attn: Desk Officer for SSA

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(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security Disability Insurance; 96.002, Social Security Retirement Insurance; 96.004, Social Security Survivors Insurance; 96.006, Supplemental Security Income).

## LIST OF SUBJECTS

### *20 CFR Part 404*

Administrative practice and procedure, Blind, Disability benefits, Old-age, survivors and disability insurance, Reporting and recordkeeping requirements, Social security.

### *20 CFR Part 416*

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security, Supplemental Security Income (SSI).

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Andrew Saul,  
Commissioner of Social Security.

For the reasons stated in the preamble, we propose to amend 20 CFR, chapter III, part 404, subparts D and P, and part 416, subpart I, as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE  
(1950)

Subpart D—Old-Age, Disability, Dependents' and Survivors' Insurance Benefits; Period  
of Disability

1. The authority citation for subpart D of part 404 continues to read as follows:

Authority: Secs. 202, 203(a) and (b), 205(a), 216, 223, 225, and 702(a)(5) of the  
Social Security Act (42 U.S.C. 402, 403(a) and (b), 405(a), 416, 423, 425, and 902(a)(5)).

2. Amend §404.335 by revising the paragraph (b) introductory text and removing  
paragraph (b)(4):

**§ 404.335 How do I become entitled to widow's or widower's benefits?**

\* \* \* \* \*

(b) You apply, except that you need not apply again if you meet one of the  
conditions in paragraphs (b)(1) through (3) of this section:

\* \* \* \* \*

3. Amend §404.336 by revising the paragraph (b) introductory text and removing  
paragraph (b)(4):

**§ 404.336 How do I become entitled to widow's or widower's benefits as a surviving  
divorced spouse?**

\* \* \* \* \*

(b) You apply, except that you need not apply again if you meet one of the  
conditions in paragraphs (b)(1) through (3) of this section:

\* \* \* \* \*

#### Subpart P—Determining Disability and Blindness

4. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a)-(b) and (d)-(h), 216(i), 221(a) and (h)-(j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)-(b) and (d)-(h), 416(i), 421(a) and (h)-(j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104-193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

5. Amend §404.1501 by revising paragraph (i) and the first sentence of paragraph (j) to read as follows:

#### **§ 404.1501 Scope of subpart.**

\* \* \* \* \*

(i) In §§404.1581 through 404.1587 we discuss disability due to blindness.

(j) Our rules on when disability continues and stops are contained in §§404.1588 through 404.1598. \* \* \*

\* \* \* \* \*

6. Amend §404.1505 by revising paragraph (b) to read as follows:

#### **§ 404.1505 Basic definition of disability.**

\* \* \* \* \*

(b) There are different rules for determining disability for individuals who are statutorily blind. We discuss these in §§404.1581 through 404.1587.

\* \* \* \* \*

§404.1511 [Amended]

7. Amend §404.1511 by removing and reserving paragraph (b).



8. Amend §404.1529 by revising the last sentence of paragraph (d) introductory text to read as follows:

**§ 404.1529 How we evaluate symptoms, including pain.**

\* \* \* \* \*

(d) \* \* \* Section 404.1594 explains the procedure we follow in reviewing whether your disability continues.

\* \* \* \* \*

9. Amend §404.1576 by revising paragraph (b)(1) to read as follows:

**§ 404.1576 Impairment-related work expenses.**

\* \* \* \* \*

(b)\* \* \*

(1) You are otherwise disabled as defined in §§404.1505 and 404.1581-404.1583;

\* \* \* \* \*

**§ 404.1577 [Removed and Reserved]**

10. Remove and reserve §404.1577

**§ 404.1578 [Removed and Reserved]**

11. Remove and reserve §404.1578

**§ 404. 1579 [Removed and Reserved]**

12. Remove and reserve §404.1579.

13. Amend §404.1590 by:

a. Revising paragraph (a);

b. Revising the introductory text of paragraph (b), and revising paragraph (b)(1);

- c. Removing paragraph (b)(2);
- d. Redesignating paragraphs (b)(3) through (b)(10) as (b)(2) through (b)(9);
- e. Removing the parenthetical sentence in redesignated paragraph (b)(2);
- f. Revising redesignated paragraph (b)(6);
- g. Revising paragraph (c);
- h. Removing paragraph (d);
- i. Redesignating paragraphs (e) through (i) as paragraphs (d) through (h);
- j. Revising the second sentence in newly redesignated paragraph (d);
- k. Revising redesignated paragraphs (e) and (f);
- l. Revising the introductory text of newly redesignated paragraph (h)(1), and paragraph (h)(1)(ii);
- m. Revising the first sentence of newly redesignated paragraph (h)(2)(i);
- n. Revising the first sentence of newly redesignated paragraph (h)(2)(ii);
- o. Revising the first sentence of newly redesignated paragraph (h)(3);
- p. Revising newly redesignated paragraph (h)(4); and
- q. Revising newly redesignated paragraph (h)(5)(i).

The revisions to read as follows.

**§ 404.1590 When and how often we will conduct a continuing disability review.**

(a) *General.* We conduct continuing disability reviews to determine whether or not you continue to meet the disability requirements of the law. Payment of cash benefits or a period of disability ends if the medical or other evidence shows that you are not disabled as determined under the standards set out in section 223(f) of the Social Security Act. In paragraphs (b) through (f) of this section, we explain when and how often we

conduct continuing disability reviews for most people. In paragraph (g) of this section, we explain special rules for some people who are participating in the Ticket to Work program. In paragraph (h) of this section, we explain special rules for some people who work.

(b) *When we will conduct a continuing disability review.* Except as provided in paragraphs (g) and (h) of this section, we will start a continuing disability review if—

(1) You have been scheduled for one of the following diary reviews:

(i) A medical improvement expected diary review;

(ii) A medical improvement likely diary review;

(iii) A medical improvement possible diary review; or

(iv) A medical improvement not expected diary review;

\* \* \* \* \*

(6) Your employment network under the Ticket to Work program or State Vocational Rehabilitation Agency tells us that:

(i) \* \* \*

\* \* \* \* \*

(c) *Definitions.* As used in this section —

*Medical improvement expected (MIE) diary* refers to a diary set for a case, which we schedule for review because your impairment(s) is expected to improve. Generally, the MIE diary period is set for not less than 6 months or for not more than 18 months. We publish and maintain a list of impairments that we expect to improve in our employee operating instructions, which are publicly accessible.

*Medical improvement likely (MIL) diary* refers to a diary set for a case, which we schedule for review because your impairment(s) is likely to improve. We may also include determinations or decisions that we make at step 5 of the sequential evaluation process (see §404.1520(a)(4)(v) and (g) of this chapter. Generally, the MIL diary period is set for 2 years. We publish and maintain a list of impairments that we consider likely to improve in our employee operating instructions, which are publicly accessible.

*Medical improvement possible (MIP) diary* refers to a diary set for a case, which we schedule for review because your nonpermanent impairment(s) will possibly improve but we cannot determine with certainty that it is likely to improve. Generally, the MIP diary period is set for 3 years. We will assign this diary if your impairment(s) is nonpermanent and is not on the lists of impairments that we publish and maintain for MIE and MIL diaries.

*Medical improvement not expected (MINE) diary* refers to a diary set for a case, which we schedule for review when we consider your impairment(s) permanent and for which we do not expect medical improvement in your impairment(s). We may consider the interaction of your age, consequences of your impairment(s), and lack of recent attachment to the labor market in determining whether to set a MINE diary. Generally, the MINE diary period is set for 6 years. We publish and maintain a list of impairments that we consider likely to improve in our employee operating instructions, which are publicly accessible.

*Nonpermanent impairment* means an impairment that we do not consider permanent and for which improvement is expected, likely, or possible, but cannot be predicted based on current experience and the facts of the particular case. We assign

cases with nonpermanent impairments to one of the following diary categories: MIE, MIL, and MIP.

*Permanent impairment* means an impairment for which we do not expect medical improvement. A permanent impairment is an extremely severe condition determined on the basis of our experience in administering the disability programs to be at least static, but more likely to be progressively disabling, either by itself or by reason of impairment complications, and unlikely to improve so as to permit you to engage in substantial gainful activity. Improvement which is considered temporary under §404.1594(c)(3)(iv) of this subpart will not be considered in deciding if an impairment is permanent. We assign cases with permanent impairments to the MINE diary category.

*Vocational reexamination diary* refers to a case, which is scheduled for review at a later date because you are undergoing vocational therapy, training or an educational program which may improve your ability to work so that the disability or blindness requirement of the law is no longer met. Generally, the diary period will be set for the length of the training, therapy, or program of education.

(d) \* \* \* A change in the classification of your impairment may change the frequency with which we will review your case. \* \* \*

(e) *Review after administrative appeal.* If you were found eligible to receive or to continue to receive, disability benefit payments on the basis of a decision by an administrative law judge, the Appeals Council or a Federal court, we will not conduct a continuing disability review earlier than 3 years after that decision unless—

(1) Your case should be scheduled for a MIE, MIL, or vocational reexamination diary review; or

(2) A question of continuing disability is raised under paragraph (b) of this section.

(f) *Waiver of timeframes.* We will review all cases with a nonpermanent impairment at least once every 3 years unless we, after consultation with the State agency, determine that the requirement should be waived to ensure that only the appropriate number of cases are reviewed. We will base the appropriate number of cases we will review on such considerations as the number of pending reviews, the projected number of new applications, and projected staffing levels. We will grant such waiver only after good faith effort on the part of the State to meet staffing requirements and to process the reviews on a timely basis. We may also consider availability of independent medical resources. A waiver in this context refers to our administrative discretion to determine the appropriate number of cases to be reviewed on a State-by- State basis. Therefore, under certain circumstances, we may delay your continuing disability review longer than 3 years following our original determination or decision or other review. We would base the delay on our need to ensure that pending reviews and new disability claims workloads are accomplished within available medical and other resources in the State agency and that such reviews are done carefully and accurately.

\* \* \* \* \*

(h) \*\*\*

(1) *General.* Notwithstanding the provisions in paragraphs (b)(3), (b)(4), (b)(5)(ii), (b)(6)(ii), and (b)(7)(iii) of this section, we will not start a continuing disability review based solely on your work activity if:

\*\*\*\*\*

(ii) You have received such benefits for at least 24 months (see paragraph (h)(2) of this section).

(2) *The 24-month requirement.* (i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due under title II of the Social Security Act, or for which you have constructively received such benefits, will count for the 24-month requirement under paragraph (h)(1)(ii) of this section, regardless of whether the months were consecutive. \*

\* \*

(ii) In determining whether paragraph (h)(1) of this section applies, we consider whether you have received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act for at least 24 months as of the date on which we start a continuing disability review. \* \* \*

(3) *When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months.* Even if you meet the requirements of paragraph (h)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. \* \* \*

(4) *Reviews to determine whether the work you have done shows that you are able to do substantial gainful activity.* Paragraph (h)(1) of this section does not apply to reviews we conduct using the rules in §§ 404.1571-404.1576 of this subpart to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled.

(5) \* \* \*

(i) You provide us evidence that establishes that you met the requirements of paragraph (h)(1) of this section as of the date of the start of your continuing disability review and that the start of the review was erroneous; and

\* \* \* \* \*

14. Amend §404.1593 by revising the last sentence of paragraph (a) to read as follows:

**§ 404.1593 Medical evidence in continuing disability review cases.**

(a) \* \* \* See §404.1594.

\* \* \* \* \*

## PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

### Subpart I—Determining Disability and Blindness

15. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Sec. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383b); secs. 4(c) and 5, 6(c)-(e), 14(a), and 15, Pub. L. 98-460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

16. Amend §416.990 by:

- a. Revising paragraph (a);
- b. Revising the introductory text of paragraph (b), and paragraph (b)(1);



- c. Removing paragraph (b)(2);
- d. Redesignating paragraphs (b)(3) through (b)(10) as (b)(2) through (b)(9);
- e. Removing the parenthetical sentence in newly redesignated paragraph (b)(2);
- f. Revising newly redesignated paragraph (b)(6);
- g. Revising paragraph (c);
- h. Removing paragraph (d);
- i. Redesignating paragraphs (e) through (i) as paragraphs (d) through (h);
- j. Revising the second sentence in newly redesignated paragraph (d);
- k. Revising newly redesignated paragraphs (e) and (f);
- l. Revising newly redesignated paragraph (h) by revising the introductory text of paragraph (h)(1);
- m. Revising newly redesignated paragraph (h)(1)(ii);
- n. Revising the first sentence of newly redesignated paragraph (h)(2)(i);
- o. Revising the first sentence of newly redesignated paragraph (h)(2)(ii);
- p. Revising the first sentence of newly redesignated paragraph (h)(3); and
- q. Revising newly redesignated paragraph (h)(4)(i).

**§ 416.990. When and how often we will conduct a continuing disability review.**

(a) *General.* We conduct continuing disability reviews to determine whether or not you continue to meet the disability or blindness requirements of the law. Payment ends if the medical or other evidence shows that you are not disabled or blind as determined under the standards set out in section 1614(a) of the Social Security Act if you receive benefits based on disability or §416.986 of this subpart if you receive benefits based on blindness. In paragraphs (b) through (f) of this section, we explain

when and how often we conduct continuing disability reviews for most people. In paragraph (g) of this section, we explain special rules for some individuals who are participating in the Ticket to Work program. In paragraph (h) of this section, we explain special rules for some people who work and have received social security benefits as well as supplemental security income payments.

(b) *When we will conduct a continuing disability review.* Except as provided in paragraphs (g) and (h) of this section, we will start a continuing disability review if—

(1) You have been scheduled for one of the following diary reviews:

(i) A medical improvement expected diary review;

(ii) A medical improvement likely diary review;

(iii) A medical improvement possible diary review; or

(iv) A medical improvement not expected diary review;

\* \* \* \* \*

(6) Your employment network under the Ticket to Work program or State Vocational Rehabilitation Agency tells us that:

(i) \* \* \*

\* \* \* \* \*

(c) *Definitions.* As used in this section —

*Medical improvement expected (MIE) diary* refers to a diary set for a case, which we schedule for review because your impairment(s) is expected to improve. Generally, the MIE diary period is set for not less than 6 months or for not more than 18 months. We publish and maintain a list of impairments that we expect to improve in our employee operating instructions, which are publicly accessible.

*Medical improvement likely (MIL) diary* refers to a diary set for a case, which we schedule for review because your impairment(s) is likely to improve. We also include determinations made at step 5 of the sequential evaluation process (see §§416.920(a)(4)(v) and (g) of this chapter). Generally, the MIL diary period is set for 2 years. We publish and maintain a list of impairments that we consider likely to improve in our employee operating instructions, which are publicly accessible.

*Medical improvement possible (MIP) diary* refers to a diary set for a case, which we schedule for review because your impairment(s) will possibly improve but we cannot determine with certainty that it is likely to improve. Generally, the MIP diary period is set for 3 years. We will assign this diary if your impairment(s) is nonpermanent and is not on the lists of impairments that we publish and maintain for MIE and MIL diaries.

*Medical improvement not expected (MINE) diary* refers to a diary set for a case, which we schedule for review when we consider your impairment(s) permanent and for which we do not expect medical improvement in your impairment(s). We may consider the interaction of your age, consequences of your impairment(s), and lack of recent attachment to the labor market in determining whether to set a MINE diary. Generally, the MINE diary period is set for 6 years. We publish and maintain a list of impairments that we consider permanent in our employee operating instructions, which are publicly accessible.

*Nonpermanent impairment* means an impairment that we do not consider permanent and for which improvement is expected, likely, or possible, but cannot be predicted based on current experience and the facts of the particular case. We assign

cases with nonpermanent impairments to one of the following diary categories: MIE, MIL, and MIP.

*Permanent impairment* means an impairment for which we do not expect medical improvement. A permanent impairment is an extremely severe condition determined on the basis of our experience in administering the disability programs to be at least static, but more likely to be progressively disabling either by itself or by reason of impairment complications, and unlikely to improve so as to permit you to engage in substantial gainful activity, or if you are a child, unlikely to improve to the point that you will no longer have marked and severe limitations. Improvement which is considered temporary under §416.994(b)(2)(iv)(D) or §416.994a(c)(3) of this subpart, will not be considered in deciding if an impairment is permanent. We assign cases with permanent impairments to the MINE diary category.

*Vocational reexamination diary* refers to a case, which is scheduled for review at a later date because the individual is undergoing vocational therapy, training or an educational program which may improve his or her ability to work so that the disability or blindness requirement of the law is no longer met. Generally, the diary period will be set for the length of the training, therapy, or program of education.

(d) \* \* \* A change in the classification of your impairment may change the frequency with which we will review your case. \* \* \*

(e) *Review after administrative appeal.* If you were found eligible to receive or to continue to receive, disability benefit payments on the basis of a decision by an administrative law judge, the Appeals Council or a Federal court, we will not conduct a continuing disability review earlier than 3 years after that decision unless—

(1) Your case should be scheduled for a MIE, MIL, or vocational reexamination diary review; or

(2) A question of continuing disability is raised under paragraph (b) of this section.

(f) *Waiver of timeframes.* We will review all cases with a nonpermanent impairment at least once every 3 years unless we, after consultation with the State agency, determine that the requirement should be waived to ensure that only the appropriate number of cases are reviewed. We will base the appropriate number of cases we will review on such considerations as the number of pending reviews, the projected number of new applications, and projected staffing levels. We will grant such waiver only after good faith effort on the part of the State to meet staffing requirements and to process the reviews on a timely basis. We may also consider availability of independent medical resources. A waiver in this context refers to our administrative discretion to determine the appropriate number of cases to be reviewed on a State-by- State basis. Therefore, under certain circumstances, we may delay your continuing disability review longer than 3-years following our original determination or decision or other review. We would base the delay on our need to ensure that pending reviews and new disability claims workloads are accomplished within available medical and other resources in the State agency and that such reviews are done carefully and accurately.

\* \* \* \* \*

(h) \*\*\*

(1) *General.* Notwithstanding the provisions in paragraphs (b)(3), (b)(4), (b)(5)(ii), (b)(6)(ii), and (b)(7)(iii) of this section, we will not start a continuing disability review based solely on your work activity if:

\*\*\*\*\*

(ii) You have received such benefits for at least 24 months (see paragraph (h)(2) of this section).

(2) \*\*\*: (i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due under title II of the Social Security Act, or for which you have constructively received such benefits, will count for the 24-month requirement under paragraph (h)(1)(ii) of this section, regardless of whether the months were consecutive. \* \* \*

(ii) In determining whether paragraph (h)(1) of this section applies, we consider whether you have received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act for at least 24 months as of the date on which we start a continuing disability review. \* \* \*

(3) *When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months.* Even if you meet the requirements of paragraph (h)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. \* \* \*

(4) \* \* \*

(i) You provide us evidence that establishes that you met the requirements of paragraph (h)(1) of this section as of the date of the start of your continuing disability review and that the start of the review was erroneous; and

\* \* \* \* \*

[FR Doc. 2019-24700 Filed: 11/15/2019 8:45 am; Publication Date: 11/18/2019]